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CASE NO. 82-754

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

vs.

DANIEL LOWELL COLER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

POST OFFICE BOX 671
TALLAHASSEE, FLORIDA, 32302
(904) 488-2458

ATTORNEYS FOR RESPONDENT

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TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether the imposition of the death penalty upon a person of 18 years or older for the sexual battery of a child of 11 years or younger is disproportionate to the crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

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OPINION BELOW

The opinion of the Supreme Court of Florida has been reported as Coler v. State, 418 So.2d 238 (Fla. 1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

B

The Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C

Article I, Section 17, Florida Constitution:

> Excessive punishments. --Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

D

Section 794.011(2), Florida Statutes (1975):

> (2) A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person 11 years of age or younger in an attempt to commit sexual battery upon said person commits a capital felony punishable as provided in ss. 775.082 and 921.141. If the offender is under the age of 18, that person shall be guilty of a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, with the following additions:

The Florida Supreme Court not only unanimously vacated the death sentence; it also vacated the judgments of guilt because of a violation of the rule of similar fact evidence as promulgated by its previous opinion in Williams v. State, 110 So.2d 654 (Fla.), cert.den., 361 U.S. 847 (1959), and as codified after Respondent's trial by Section 90.404(2)(a), Florida Statutes (1981) (A-3).

The Florida Supreme Court ordered a new trial on all counts (Petitioner's appendix at 7a; 418 So.2d at 239). The mandate of the Florida Supreme Court issued on October 4, 1982 (A-1). Petitioner must bring Respondent to retrial within 90 days thereof as required by the state speedy trial rule, Florida Rule of Criminal Procedure 3.191(g) (A-2).

Petitioner sought a stay in this cause, but it was denied by Justice Lewis F. Powell on September 24, 1982.

REASONS FOR DENYING THE WRIT

A

THE SUPREME COURT OF FLORIDA DID NOT DECIDE A FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW.

The Supreme Court of Florida was confronted with the issue of whether death is cruel and unusual punishment for the rape of a child under eleven years of age by a defendant who is over eighteen. Respondent asserted in the trial court and the Florida Supreme Court that both the United States and Florida Constitutions prohibited such a severe punishment for the crime. Relying upon its prior decision in Buford v. State, 403 So.2d 943 (Fla. 1981), cert.den., 71 L.Ed.2d 319 (1982), the Florida Supreme Court held that death was indeed cruel and unusual punishment for the rape of a child eleven years old or younger. However, this decision does not present a federal question warranting this Court's review.

Article I, Section 17 of the Florida Constitution, like the Eighth Amendment to the United States Constitution, forbids cruel and unusual punishment. It reads:

> Excessive punishments.--Excessive fines, cruel or unusual punishment, attainder, forfeiture or estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Respondent raised the Florida constitutional provision in the trial court and on appeal. Reliance upon its prior decision in Buford does not mean that the case was decided solely on the federal constitution. Adopting the reasons of a federal court's interpretation of the federal constitution in interpreting similar provisions of the Florida Constitution does not raise a federal question for this Court to review.

Assuming the Florida Court's decision was based only upon the federal constitution, there is still no reason for this Court to review the question. Coker v. Georgia, 433 U.S. 584 (1977) gives more than adequate guidance regarding

the constitutionality of a death sentence for rape. Although this Court's holding in Coker was limited to the rape of an adult woman, the rationale behind the decision indicates that a death sentence for any rape runs afoul of the cruel and unusual punishment provisions. This Court's two step disproportionality analysis demonstrated that the values of contemporary society and the nature of the crime of rape cannot justify death as a penalty for any rape.

Society's values are mirrored in the various state's legislatures. As Petitioner noted (page 7 of petition), only Florida and Mississippi have statutes authorizing death for rape of a child. Petitioner's assertion that other states may have hesitated in enacting a death penalty statute for child rape because of confusion generated by Furman v. Georgia, 408 U.S. 238 (1972) is pure speculation. Florida, Mississippi and Tennessee did not hesitate. Section 794.011 (2), Florida Statutes (1975); §97-3-65, Miss.Code Ann. (1974); §39-3702, Tenn.Code Ann (1974).[1/] Additionally, the frequency of imposition of a death sentence for rape of a child shows jury's and court's reluctance to exact such an extreme penalty.[2/]

Turning to the nature of the crime, this Court's reasoning in Coker continues to supply adequate guidance. As abhorrent as the rape of a child may be, it still "does not compare with murder, which...[involves] the unjustified taking of human life." Coker v. Georgia, 433 U.S. 584,598 (1977). The majority opinion in Coker summarized this distinction as follows:

> Life is over for the victim of the murderers; for the rape victim, life may not be nearly so happy as it was, but it

---

1/ Tennessee's statute has since been invalidated. Collins v. State, 550 S.W.2d 643 (Tenn. 1977).

2/ The Florida Supreme Court has reversed death sentences in three cases of capital rape prior to Respondent's case. Purdy v. State, 343 So.2d 4 (Fla.) cert.den., 434 U.S. 847 (1977); Huckaby v. State, 343 So.2d 29 (Fla.), cert.den., 434 U.S. 920 (1977); Buford v. State, supra.

> is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and revocability," 428 U.S. 187, is an excessive penalty for the rapist who, as such, does not take human life.

Id. The Florida Supreme Court correctly concluded that a death sentence for the crime of rape, regardless of the age of the victim, is disproportional to the offense.

Petitioner was unable to persuade this Court to accept review of the identical question in Buford, and its petition filed herein is remarkably similar to that which it filed in Buford. Moreover, in the interim, this Court in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982) clearly held that the death penalty is unconstitutional even for a participant in a felony-murder, who neither takes a life, nor intends to take a life, nor attempts to take a life. Thus, it is beyond belief that this Court would ever sanction the death penalty for a non-homicide.

B

THE DECISION OF THE SUPREME COURT OF FLORIDA SHOULD NOT BE REVIEWED BECAUSE RESPONDENT HAS BEEN GRANTED A NEW TRIAL.

The certiorari jurisdiction of this Court is narrowly defined by 28 USC §1257(3), and requires a final judgment. The opinion of the Supreme Court of Florida is not a "final judgment" because that opinion remanded this cause for a new trial.

This Court sometimes will review a judgment of a state appellate court which reverses a trial court and remands to the trial court, but only where that remand is for a ministerial purpose. Abood v. Detroit Board of Education, 431 U.S. 209, reh.den. 433 U.S. 915 (1977); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973). The reasons for requiring a final decision of a state court prior to Supreme Court review were stated in the latter case as follows:

> The finality requirement of 28 USC §1257 which limits our review of state court judgments, serves several ends: (1) it avoids peacemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Id. 414 U.S. at 159. See also California v. Green, 399 U.S. 149, 169-70 (1970).

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Respondent requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida, 32302
(904) 488-2458

Member of the Bar of this Court

CASE NO. 82-754

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STATE OF FLORIDA,

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vs.

DANIEL LOWELL COLER,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Duval County, Florida

OCT 20 1982
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

WHEREAS, in that certain cause filed in this Court styled:

DANIEL LOWELL COLER vs. STATE OF FLORIDA

Case No. 54,250

Your Case No. 77-1833-CF

The attached opinion was rendered on May 13, 1982

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Alderman

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 4th day of October, 1982

Clerk of the Supreme Court of Florida.

* * *

(g) Effect of Mistrial; Appeal; Order of New Trial. A person who is to be tried again or whose trial has been delayed by an appeal by the State or the defendant shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from an appellate or other reviewing court which makes possible a new trial for the defendant, whichever is last in time.

90.404 Character evidence; when admissible.

* * *

(2) OTHER CRIMES, WRONGS, OR ACTS.—

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida have been hand delivered to Mr. Gregory C. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida, and copies have been mailed to the Respondent, Mr. Daniel L. Coler, c/o Duval County Jail, Post Office Box 779, Jacksonville, Florida, 32202, this 18 day of November, 1982. I further certify that all parties necessary to be served have been served.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

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Petitioner, :

v. :

DANIEL LOWELL COLER, :

Respondent. :

_____ :

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

DANIEL LOWELL COLER, respondent in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by respondent has been filed, with the brief in opposition to the petition, wherein respondent sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Respondent was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that respondent be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida, 32302
(904) 488-2458

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis as well as the attached Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis, have been hand delivered to Mr. Gregory C. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida, and copies have been mailed to the Respondent, Mr. Daniel Lowell Coler, c/o Duval County Jail, Post Office Box 779, Jacksonville, Florida, 32202, this 18 day of November, 1982. I further certify that all parties necessary to be served have been served.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1982

Case No.

STATE OF FLORIDA,

Petitioner

v.

DANIEL LOWELL COLER,

Respondent.

I, DANIEL COLER, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

Daniel Coler
DANIEL COLER

STATE OF FLORIDA

COUNTY OF BRADFORD

The foregoing affidavit of DANIEL COLER was subscribed and sworn to before me this 10th day of November 1982.

NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:
Notary Public, State of Florida at Large
My commission expires Sept. 27, 1984